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No. 963

In the

Supreme Court of the United States

October Term, 1962

GEORGE PEKAR, JOSEPH ROZELL, EDWARD PATTERSON, JOHN AUDIA, MELVIN GOWER and ROBERT SCHMANTOWSKY, individually and in behalf of all other employees of Goebel Brewing Company who worked at Plant No. 3 of said Company prior to the closing thereof,

Petitioners,

vs.

LOCAL UNION NO. 181 of the International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, AFL-CIO

and

INTERNATIONAL UNION OF UNITED BREWERY, FLOUR, CEREAL, SOFT DRINK AND DISTILLERY WORKERS OF AMERICA, AFL-CIO,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents, Local Union No. 181 and the International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, AFL-CIO, respectfully re-

quest that this Honorable Court refuse to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in this case on December 31, 1962.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

The record in this case does not warrant the Questions Presented as set out on page 2 of the Petition. The essential question is: Does a union breach its duty of fair representation when it refuses to take an employee seniority grievance to arbitration when (1) the union and the company, both acting in complete good faith, agree that the grievance has no merit, (2) the position of the Union and the compar , is based upon ten years of mutually-agreed construction of the seniority provisions, (3) this construction of the seniority provisions has repeatedly been reported to and concurred in by the union membership, (4) the collective agreement upon which this action is predicated was negotiated with full knowledge on the part of the union, its members (including the Petitioners) and the company of the historical interpretation of the seniority provisions, and (5) the agreement provides that "All differences and misunderstandings which may arise shall be settled between the Employer and the Local Union by regular grievance procedure, *and if no adjustment satisfactory to both parties can be reached in this way*", by arbitration?

ADDITIONAL STATEMENT OF THE CASE

The abbreviated statement of facts set out in the Petition (pp. 3-7), while correct, with one important exception which is discussed below, hardly does justice to the case. The facts are dealt with in great detail in the opinion of the Court of Appeals (Petition App. pp. 1a-9a).

The important inaccuracy in the Petitioners' Statement is in its quotation of Section 6(b)(5) of the collective agreement (Petition, p. 5), which pertains to the checkers' seniority list. As found by the Trial Court (App. 31a), this provision should read:

> "There shall be a seniority list for Stroh checkers and a seniority list for Goebel checkers for plant 1 and plant 3 that shall be strictly used to determine layoffs and recalls in the checking department only."

The importance of this provision lies in the fact that the Court of Appeals found, we think properly, that its presence in the collective agreement created an ambiguity in the meaning of the seniority provisions governing the Petitioners, who were bottlers. Said the Court of Appeals (Petition App. p. 13a):

> "Section 6 (b) (5) provides that there shall be a seniority list for Stroh checkers and a seniority list for Goebel checkers at Plant 1 and at Plant 3 that shall be strictly used to determine layoffs and recalls in the Checking Department only. Reading 6 (b) (4) and 6 (b) (5) together, it appears that the parties took pains to make it clear that the single seniority list of checkers was to control the layoffs of checkers in both plants on a company-wide basis. The fact that it was specifically stated that this provision was to apply to checkers only would indicate that the single seniority list would not apply to bottlers and other employees. We think there is an ambiguity in Sections 6 (b) (4) and (5)."

It is not claimed, nor did the District Court find, that the Respondents acted arbitrarily or out of bias, bad faith or hostile discrimination against Petitioners. The Court of Appeals found affirmatively that the actions of Respondents were at all times "governed by candidness in its dealings with its members", that they did not favor one group over

the other, and that they acted "fairly, impartially and with no hostile discrimination" (Petition App. p. 18a).

REASONS FOR DENYING THE WRIT

1. The Court of Appeals did not err in overruling the judgment of the District Court. The material facts are undisputed and they establish the Respondents' good faith, impartiality, objectivity and reasonableness in rejecting Petitioners' grievance. Upon such facts, an action for breach of the duty of fair representation cannot be sustained.

In *Ford Motor Company* v. *Huffman*, 345 U.S. 330 (1953), the basic rule was stated as follows:

> "Their statutory obligation to represent all members of an appropriate unit requires them to make an honest effort to serve the interests of all those members, without hostility to any."

See also *Steele* v. *Louisville & Nashville R. R. Co.*, 323 U.S. 192, 202-3 (1944). Professor (now Solicitor General) Archibald Cox summed up the law on this subject in *Individual Enforcement of Collective Agreements*, 8 Labor Law Journal, 850, at p. 858, as follows:

> "Nearly all the courts in which the issue has been raised have held that both the bargaining representative's decision not to press an individual's grievance and also a settlement between the representative and the employer preclude an individual action in the absence of fraud and caprice."

None of the cases holding that the union has an enforceable duty to represent employees fairly and without discrimination implies that the courts have broad powers to review decisions taken by unions in the exercise of those powers. Relief has been granted only in cases involving

the most blatant and undeniable kinds of discrimination, usually, racial discrimination. As was stated in the *Huffman* case, *supra*, at p. 337:

> "The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion."

Therefore, when an employee alleges a breach of the Union's duty of fair representation, the test to be applied is whether the action of the Union was within "a wide range of reasonableness" and was taken "in good faith and honesty of purpose." The test is *not* whether the Union correctly interpreted the contract in accordance with the technical legal rules of contract interpretation. While such a test might apply in an action in contract, it has no place in an action for breach of the statutory duty of fair representation.

The following, from the opinion of Judge Medina in *Cunningham* v. *Erie Railroad Company*, 266 F. 2d 411 (2d Cir. 1959), is directly applicable:

> "As we have already indicated, in order to establish a breach by the union of its duty to represent the employees fairly, as the bargaining representative of the employees sanctioned by statute, *it is not enough to prove that the union was wrong in demanding Cunningham's dismissal.* This duty was no more than to forbear from 'hostile discrimination'. The arbitrariness shown must be of the bad faith kind. As Justice Stone suggested in *Steele*, 323 U.S. at page 203, it is not violative of federal law that the union not satisfy all employees or that it improperly balance the rights and obligations of the various groups it represents. *Something akin to factual malice is necessary.*" (Italics supplied.)

As Professor (now Solicitor General) Cox stated in *69 Harvard Law Review*, 601 at page 622:

> "All this suggests that the bargaining rights of the majority representatives are as broad *in the administration of a collective agreement as in its negotiation.*" (Italics supplied.)

This being the case, there clearly was no breach of the duty of fair representation in this case.

2. Petitioners contend — contrary to their position in the courts below — that the contract requires that it be interpreted through arbitration and not by a court. This is a complete reversal of position by Petitioners. Their Bill of Complaint specifically prayed that the District Court "render and issue a declaratory judgment defining and determining Plaintiffs' rights in the premises". In the Court of Appeals the defendants (Respondents here) challenged the Trial Court's right to interpret the seniority provisions of the contract. The position of the Plaintiffs (Petitioners here) was stated as follows on page 21 of their brief in the Court of Appeals:

> "The foregoing does not ignore the defendants' contention that the trial court had 'no right' to interpret the contract. The plaintiffs assert that they had certain rights under the contract which the defendants refused to enforce and, by so doing, breached their duty of representation. It is impossible to determine whether they had such rights without considering the provisions of the contract and, clearly, this court is concerned with the validity of the trial court's determination. With all due respect for the right of the company and the union to have differences between them resolved by arbitration and the case law upholding this right, this is not the question presently before us, even though interpretation of the contract is incidentally involved. None of the cases involving the union's duty of fair representation would have arisen

> had not the union and the company been in basic agreement, the issue in each case being whether the union was correct in assuming a posture conformably to that taken by the company."

Thus, Petitioners defended the right of the Trial Court to interpret the contract in order to determine whether Respondents had breached their duty of fair representation, but now claim the Court of Appeals did not have the same right – unless, presumably, it agreed with the Trial Court's interpretation.

3. The grievance and arbitration provisions clearly do not contemplate resort to arbitration when the union and the company are in agreement. Indeed, Section 1(a) of Article VIII of the agreement (quoted in full on page 6 of the Petition) specifically provides that differences or disputes shall be submitted to arbitration only "if no adjustment satisfactory to both parties can be reached" through the grievance procedure. The context leaves no doubt that "both parties" means the Employer and the Local Union. In the instant case there was no dispute whatever between the parties.

In referring to the "therapeutic values" of grievance processing in *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564, this court emphasized the importance of giving effect to the "method agreed upon by the parties" for the settlement of disputes. It did not suggest that there is any therapeutic value in requiring the arbitration of disputes when no dispute exists between the parties to the agreement and their contract contemplates that only such disputes be arbitrated. To require the union to arbitrate whenever an individual employee disagrees with the interpretation of the contract which is mutually shared by the union and the employer would result in chaos in the administration of collective

agreements and would seriously undermine the status and responsibility of the collective bargaining representative.

4. The relief requested and granted by the District Court is wholly inconsistent with Petitioners' present position. The District Court rendered a declaratory judgment upholding the seniority rights claimed by Petitioners, and it enjoined the Defendants to enforce those rights "by all legal means and methods". Contrary to Petitioners' contention (Petition, p. 12), the District Court did not direct the Defendants to arbitrate in order to ascertain whether Plaintiffs had the seniority rights which they claimed, but directed the Defendants to enforce Plaintiffs' seniority rights "as hereinabove declared and set forth" (App. 35a). Petitioners, who would uphold the judgment of the District Court, are hardly in a position to argue that their seniority rights may be determined only through arbitration.

5. The decision of the Court of Appeals is soundly based upon the decisions of this Court in *Ford Motor Company* v. *Huffman, supra, Steele* v. *Louisville & Nashville R. R. Co., supra,* and upon holdings of the Circuit Courts of Appeals in cases involving the duty of fair representation, such as *Cunningham* v. *Erie Railroad Company, supra,* and *Ostrofsky* v. *United Steelworkers of America,* 171 F. Supp. 782, aff'd 273 F. 2d 414 (4th Cir. 1960).

6. There were a number of other serious infirmities in the judgment of the District Court which defendants raised on appeal but which the Court of Appeals did not reach, namely: (1) that the company had not been made a party defendant, (2) that the injunction order was void because of vagueness and indefiniteness, (3) that the International Union should in no event be held liable, (4) that jurisdiction over the subject matter was vested exclusively in the National Labor Relations Board, (5) that the action was barred by the statute of limitations or by laches, and (6) that the pendency of a state court action involving the same subject matter required dismissal of the complaint.

CONCLUSION

The Court of Appeals decision reversed the District Court on both the facts and the law, although the facts, even as found by the District Court, required dismissal of the complaint. The decision of the Court of Appeals is eminently and obviously correct. Any other conclusion would have been unconscionable. Petitioners' present position is a complete reversal of the one they took at all prior stages of this case. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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